President Hotel Sdn Bhd v Datuk Bandar Kuala Lumpur & Anor (Crest Trading Sdn Bhd, intervener)

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1-25-79 OF 1993
LOW HOP BING JC
17 MARCH 1995

Administrative Law *— Remedies — Certiorari — Leave for extension of time to make application — Leave granted ex parte — Inherent jurisdiction of court to set aside leave — Irregularity in obtaining leave — Lack of notice to respondent — Delay in applying for leave — Failure to make full and fair disclosure of material facts — Whether court should set aside leave — Rules of the High Court 1980 O 53 r 1A*

Civil Procedure *— Affidavits — Contested facts — Whether deponents should be cross-examined*

A development order dated 22 October 1991 was issued by the first respondent in favour of the intervener to construct a 17-storey hotel in Kuala Lumpur. The site was adjacent to a lot of land belonging to the applicant. On 16 July 1993, the applicant applied for leave to issue certiorari to quash the development order and for extension of time stating, inter alia, that the delay in applying was that it did not have any knowledge of the issuance of the development order. Leave and extension of time was granted on an ex parte basis. The applicant based its application on the ground that the development order was issued without according a right of hearing to the adjacent landowner in accordance with the then prevalent practice at Dewan Bandaraya on planning matters. The intervener applied to set aside the leave and extension of time granted, contending that the ex parte order was irregular and bad in law; and that in any event, the applicant had occasioned inordinate delay which barred the grant of the order in question.

Held, allowing the application:

(1) The court had inherent jurisdiction to set aside leave granted ex parte.

(2) The ex parte order for extension of time was obtained irregularly and should be set aside ex debito justitiae. The applicant had failed to give notice to the respondents or the intervener of its application to extend time to challenge the development order.

(3) The delay of one year and nine months between the issuance of the development order and the filing of the application for leave was inordinate delay.

(4) In judicial review cases, the applicant applying for leave owed a duty of full disclosure and uberrimae fide in that he was duty bound to make a full and candid disclosure of all material facts.

(5) With regard to contested facts on affidavits, the court had adopted the approach of making a critical assessment on affidavits in lieu of ordering cross-examination of deponents.

(6) There was material non-disclosure of facts by the applicant. The assertions by the applicant that it had no knowledge of the existence of the development order prior to the application for leave were incredulous.

[Bahasa Malaysia summary

Satu perintah pembangunan bertarikh 22 Oktober 1991 telah diisu oleh penentang pertama kepada pencelah untuk membina sebuah hotel 117 tingkat di Kuala Lumpur. Tapak pembangunan itu bersebelahan dengan satu lot tanah kepunyaan pemohon. Pada 16 Julai 1993, pemohon memohon untuk kebenaran mengisu certiorari untuk membatalkan perintah pembangunan dan untuk perlanjutan masa dengan menyatakan, antara lainnya, bahawa kelengahan dalam membut permohonan itu adalah kerana ia tidak mempunyai sebarang pengetahuan tentang pengisuan perintah pembangunan itu. Kebenaran dan perlanjutan masa telah diberikan ex parte. Pemohon mendasarkan permohonannya atas alasan bahawa perintah pembangunan itu telah diisu tanpa memberikan hak untuk didengar kepada tuanpunya tanah bersebelahan mengikut amalan Dewan Bandaraya yang berkuatkuasa pada masa itu berkenaan perkara perancangan. Pencelah memohon untuk mengetepikan kebenaran dan perlanjutan masa yang diberikan, dihujah bahawa perintah ex parte itu adalah luar aturan dan tidak baik di sisi undang-undang; dan bahawa dalam apa keadaan sekalipun, pemohon telah berlengah secara keterlaluan yang menghalang pemberian perintah tersebut.

Diputuskan, membenarkan permohonan itu:

(1) Mahkamah mempunyai bidang kuasa sedia ada untuk mengetepikan kebenaran yang diberikan ex parte.

(2) Perintah ex parte untuk perlanjutan masa telah diperolehi di luar aturan dan patut diketepikan ex debito justitiae. Pemohon telah gagal memberikan notis kepada penentang atau pencelah tentang permohonannya untuk melanjutkan masa untuk mencabar perintah pembangunan itu.

(3) Kelegahan satu tahun dan sembilan bulan di antara pengisuan perintah pembangunan itu dan pemfailan permohonan untuk kebenaran adalah kelengahan yang tidak berpatutan.

(4) Dalam kes-kes kajian semula kehakiman, pemohon yang memohon kebenaran berhutang tugas pendedahan sepenuhnya

dan uberrimae fide yakni beliau mempunyai tugas membuat pendedahan yang penuh dan terus terang tentang semua fakta material.

(5) Berkenaan dengan fakta yang dicabar atas afidavit, mahkamah telah membuat penilaian yang kritikal atas afidavit sebagai ganti mengarahkan pemeriksaan balas deponen.

(6) Terdapat kegagalan membuat pendedahan fakta yang material oleh pemohon. Pengataan pemohon bahawa ia tidak mempunyai pengetahuan tentang kewujudan perintah pembangunan itu sebelum permohonan untuk kebenaran tidak boleh dipercayai langsung.]

Notes

For cases on certiorari, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 96–227.

For cases on cross-examination on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 189–192.

Cases referred to

AMZ Corp Sdn Bhd v Sye Ah Chai [1989] 1 MLJ 238 (refd)

Anderson v Valuer-General [1974] 1 NZLR 603 (refd)

Bank Negara Malaysia v Mohammed Ismail & Ors [1992] 1 MLJ 400 (folld)

Becker v Noel [1971] 1 WLR 803; [1971] 2 All ER 1248 (folld)

Brinks-Mat Ltd v Elcombe [1988] 1 WLR 1350; [1988] 3 All ER 188 (folld)

Craig v Kanssen [1943] KB 256; [1943] 1 All ER 108 (refd)

Datin Azizah bte Abdul Ghani v Datuk Bandaraya Kuala Lumpur & Ors [1992] 2 MLJ 393 (refd)

Gnanasundram v Public Services Commission [1966] 1 MLJ 157 (refd)

Griffiths v Secretary of State for the Environment [1983] 2 AC 51; [1983] 2 WLR 172; [1983] 1 All ER 439 (refd)

Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd & Ors [1994] 2 MLJ 789 (folld)

Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor [1983] 2 MLJ 54 (refd)

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 WLR 1096; [1982] 3 All ER 1124 (folld)

Ratnam v Cumarasamy & Anor [1965] 1 MLJ 228 (refd)

Ravi a/l G Suppiah v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1995] 1 AMR 513 (refd)

R v Herrod, ex p Leeds City District Council [1976] 1 QB 540 (refd)

R v Lloyd's of London, ex p Briggs [1993] 1 Lloyd's Rep 176 (folld)

Supputetchimi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (folld)

Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd [1993] 2 AMR 37 (refd)

Tay Bok Choon v Tahansan Sdn Bhd [1987] 1 MLJ 433 (folld)

Legislation referred to

Federal Territory (Planning) Act 1982
Special Relief Act 1950 s 44(1)
Emergency Planning (Development) Rules 1970
Rules of the High Court 1980 O 53 rr 1(2), 1A

Logan Sabapathy, Jasvinder Singh and *P Gnanathan* (*Megat Najmuddin Leong & Co*) for the applicant.

Dato' Zaki Tun Azmi and *Woo Lai Kee* (*Rashid & Lee*) for the respondents.

Cyrus V Das, A Gnanarajah and *S Nantha Balan* (*Shook Lin & Bok*) for the intervener.

Cur Adv Vult

Low Hop Bing JC: *Application*

The intervener vide encl 30 applies to set aside the leave and extension of time granted ex parte to the applicant on 8 September 1993, pursuant to O 53 r 1(A) of the Rules of High Court 1980. At the time of intervention, the intervener vide encl 20 gave notice to the court and obtained an order enabling it to 'make any application as may be necessary' in the proceedings.

The applicant vide its main application in encl 21 purports to challenge a development order dated 22 October 1991 ('development order') issued by the Datuk Bandar (respondent 1) in favour of the intervener to construct a 17-storey hotel called Fairmont Hotel on Lots 812-816, section 67, Jalan Walter Grenier, Kuala Lumpur which are adjacent to Lot 817 belonging to the applicant. The development order was issued without according a right of hearing to the adjacent landowner, eg applicant in accordance with the then prevalent practice at Dewan Bandaraya on planning matters.

About ten months later, on 7 August 1992, the Supreme Court delivered its decision in *Datin Azizah bte Abdul Ghani v Datuk Bandaraya Kuala Lumpur* [1992] 2 MLJ 393 pronouncing for the first time that the Emergency Planning (Development) Rules 1970 giving a right of hearing to an adjacent landowner continued to apply to planning decisions under the Federal Territory (Planning) Act 1982 ('the Act') so that adjacent landowners were entitled to a right of hearing under the Act.

Consequently on 16 July 1993, the applicant vide encl 2 applied for leave to issue certiorari to quash the development order, and for extension of time stating, inter alia, that the delay in applying was that it did not have any knowledge of the issuance of the development order in favour of the intervener, and basing its claim for certiorari entirely on the grounds in the *Datin Azizah* case, supra.

On 8 September 1993, this court granted leave and extension of time under O 53 r 1(A) on an ex parte basis, relying on the applicant's aforesaid explanation for the delay.

A The period of delay between the date of the development order and the filing of application in encl 2 was about one year nine months. The period of delay between the purported discovery of development works in March 1993 and the commencing of application in encl 2 on 16 July 1993 was four months.

B

INTERVENER'S CONTENTION

The intervener contends that the grant of leave and extension of time ex parte was irregular and bad in law and ought to be set aside. In any event, the intervener's further submission was that the applicant has C occasioned inordinate delay which bars the grant of leave and extension of time which is a discretionary relief.

RESPONDENTS' CONTENTION

The intervener's contention is strongly supported by the respondents D who submit that the applicant's application in encl 2 must fall on the following grounds, viz:

(1) limitation pursuant to O 53 r 1(A);

(2) waiver by reason of the applicant's delay; and

E (3) unreasonable delay on the part of the applicant.

APPLICANT'S CONTENTION

It was submitted on behalf of the applicant that the applicant has satisfactorily accounted for the delay and has therefore fulfilled the F requirement of O 53 r 1(A), the relevant portion of which states that '... the delay is accounted for to the satisfaction of the court or Judge to whom the application for leave is made.'

DECISION OF THE COURT

G

(1) *Inherent jurisdiction to set aside leave*

The starting point is to determine the jurisdiction of the court to set aside leave granted ex parte. This jurisdiction is described as an inherent jurisdiction possessed by the court to set aside ex parte orders including H the grant to leave to apply for judicial review (see Lewis *Judicial Remedies in Public Law* (1992, Sweet & Maxwell) p 243).

This inherent jurisdiction is further affirmed by Lord Denning, MR in *Becker v Noel* [1971] 1 WLR 803; [1971] 2 All ER 1248, as follows:

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> where leave is given ex parte it is always within the inherent jurisdiction of the court to revoke that leave if it feels that it gave its original leave under a misapprehension upon new matters being drawn to its attention.

(2) *Is the ex parte extension of time irregular?* A

As a general rule, an application for leave to issue certiorari pursuant to O 53 r 1(2) may be made ex parte. However, an application for extension of time beyond the six-week period under r 1A is, by practice, to be made inter partes. In the *Supreme Court Practice 1979* Vol 1 p 831 para 53/1–14/23, it was stated as follows: B

> The court may extend the time under O 3 r 5 (and see *R v LCC* 141 LT 590), but will only do so where a strong case for it is shown. Notice of the application must be given to the person who will be respondent to the motion (*R v Ashford, Kent JJ, ex p Richley* [1955] 1 WLR 562).
>
> This practice was applied in order that the respondent may be heard on C the question whether or not it is a fit case in which to extend the time.

As the applicant's application vide encl 2 is made ex parte, the applicant has failed to give notice to the respondent or the intervener (who is the person most affected by the application) of its application to extend time to challenge the development order. The ex parte order for extension D of time is therefore obtained irregularly and should be set aside ex debito justitiae (see *Craig v Kanssen* [1943] KB 256; [1943] 1 All ER 108).

(3) *Delay on the part of the applicant in commencing the application in encl 2* E

Order 53 r 1A lays down a six-week limitation period within which the applicant must commence an application in encl 2. Order 53 r 1A prescribes that:

> ... leave shall not be granted to apply for an order of certiorari to remove F any judgment, order, conviction or other proceeding, for the purpose of being quashed, unless the application for leave is made within 6 weeks after the date of the proceeding ... except where the delay is accounted for to the satisfaction of the court or judge ...

In *R v Herrod, ex p Leeds City District Council* [1976] 1 QB 540 at p 557 G Lord Denning MR held that the time limit (to seek an order of certiorari) is not an entitlement. It is a maximum rarely to be exceeded. If a person comes to the High Court seeking certiorari, he should act promptly and before the other party has taken any steps based on the faith of the decision.

In the same case, James LJ held: H

> Once an issue is raised as to delay in making the application, it is for the applicant to discharge the burden of showing that in all the circumstances he should, in the exercise of that discretion, be granted the relief sought.

In *Gnanasundram v Public Services Commission* [1966] 1 MLJ 157, Raja I Azlan Shah J (now HRH Sultan of Perak) held that the court will only extend the time where a strong case for it is shown and the only delay the court will excuse is the delay involved in the pursuit of a legal remedy open to the applicant.

Further, in *Anderson v Valuer-General* [1974] 1 NZLR 603, Roper J held, inter alia, that prerogative remedies being discretionary, should not be made available to those who delay in bringing their actions and that the court in exercising its discretion is entitled to enquire into the conduct of the applicant and the circumstances of the case to ascertain whether or not it is proper to grant the relief sought.

In *Ratnam v Cumarasamy & Anor* [1965] MLJ 228, the Privy Council held that Rules of Court must prima facie be obeyed. It must be, I add, meticulously and faithfully complied with. As Eusoff Chin J (now Chief Justice of the Federal Court) aptly said in *Syarikat Telekom Malaysia Bhd v Business Chinese Directory Sdn Bhd* [1993] 2 AMR 37:2154: 'Failure to comply with them will lead to chaos in the conduct of litigation.' (See also *Ravi a/l G Suppiah, S v Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1995] 1 AMR 513.)

In *Mersing Omnibus Co Sdn Bhd v Minister of Labour and Manpower & Anor* [1983] 2 MLJ 54 the Federal Court held that the six-week time limit for certiorari under O 53 was mandatory. Abdoolcader FJ (delivering the judgment of the Federal Court) followed the House of Lords in *Griffiths v Secretary of State for Environment* [1983] 2 AC 51; [1983] 2 WLR 172; [1983] 1 All ER 439 which was a planning case. Lord Bridge emphasised that in planning cases, those undertaking development should be able confidently, after the expiry of the six-week period, to carry on the proposed development without fear of any uncertainty. He said at p 447 as follows:

> The six weeks' time limit is of much greater importance in a case where the decision was to grant planning permission. Six weeks after the Secretary of State has granted permission for development on appeal, the applicant for that permission should be in a position to proceed with confidence to carry out the development or to buy or sell the land with the benefit of the permission. But if time does not start to run until all interested parties have been given notice of the decision, and if, by some administrative oversight, the decision was never communicated either to the local planning authority or to a tenant farmer, the permission would be liable to be invalidated after the development had been carried out or the land had changed hands at a price reflecting the value of the planning permission. I do not believe such a bizarre result can have been intended.

In the instant case, the delay of one year nine months is certainly an inordinate delay. The intervener has commenced construction works on the building on the strength of the development order and has expended over RM6m in building costs. The construction of the 17-storey building is progressing on schedule and due for completion in 1995. It was undertaken on the strength of the development order which almost two years later the applicant now seeks to impugn. They had applied for an injunction (encl 23) to stop the building, but had never pursued it with any conviction or vigour. The applicant's entire approach to this case is based on hesitancy and uncertainty in their own case.

The facts of this case fall squarely within Lord Bridge's observation in *Griffith*'s case that it would be a disaster to development under planning laws if after almost two years a development order can be set aside. In that case no builder or developer would embark on any project with certainty.

(4) *Duty of the applicant in an ex parte application for leave*

It is trite law that in judicial review cases, the applicant applying for leave owes a duty of full disclosure and uberrimae fide in that he is duty bound to make a full and candid disclosure of all material facts. In *O'Reilly v Mackman* [1983] 2 AC 237 at p 280; [1982] 3 WLR 1096; [1982] 3 All ER 1124 at pp 1130–1131, Lord Diplock in the House of Lords observed:

> Such affidavit was required to satisfy the requirement of uberrimae fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself a ground for refusing the relief sought in the substantive application for which leave was obtained on the strength of the affidavit.

This principle relating to an ex parte applicant's duty of full and frank disclosure and uberrimae fide was applied in *R v Lloyd's of London, ex p Briggs* [1993] 1 Lloyd's Rep 176. Here, the leave application for judicial review was set aside on ground of failure to make full disclosure. Legatt LJ held that the respondents there were entitled to set aside the leave if 'the leave is one which plainly should not have been granted'. Hence the leave was set aside where there was a misrepresentation on the affidavit arising from a failure to disclose the overlapping of issues with other parallel proceedings. I apply the requirements of disclosure in ex parte proceedings stipulated by Gibson LJ in *Brinks-Mat Ltd v Elcombe* [1988] 1 WLR 1350; [1988] 3 All ER 188 as follows:

> (i) The duty of the applicant is to make a full and fair disclosure of all material facts: see *R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the *Kensington Income Tax Commissioners* case, per Lord Cozens-Hardy MR at p 504, citing *Dalglish v Jarvie* (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92 and *Thermax Ltd v Schott Industrial Glass Ltd* [1981] FSR 289 at 295 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see *Bank Mellatt v Nikpour* [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the applicant; and (b) the order for which application is made and the probable effect of the order on the defendant: see for example, the

examination by Scott J of the possible effect of an Anton Piller order in *Columbia Picture Industries Inc v Robinson* [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see per Slade LJ in *Bank Mellat v Nikpour* [1985] FSR 87 at 92–93; (v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains [an ex parte injunction] without full disclosure ... is deprived of any advantage he may have derived by that breach of duty ...': see per Donaldson LJ in *Bank Mellat v Nikpour*, at p 91 citing Warrington LJ in *Kensington Income Tax Commissioners'* case [1917] 1 KB 486, 509. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally, 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': per Lord Denning MR in *Bank Mellat v Nikpour* [1985] FSR 87, 90. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex-parte order, nevertheless to continue the order, or to make a new order on terms.

Within our shores, Abdul Malek J in *AMZ Corporation Sdn Bhd v Sye Ah Chai* [1989] 1 MLJ 238 dismissed a motion for certiorari on the ground that the applicant had failed to disclose at leave stage the fact of having also appealed against the Industrial Court award and that constituted 'unclean' hands.

Having stated the principle of law relating to an applicant's duty of full disclosure and uberrimae fidei, I shall now refer to the various affidavits which are relevant to encl 30 in order to determine if the applicant in encl 2 has failed in, or committed a breach of, the said duty. As stated above, the applicant's ground for applying for leave and extension of time was that it did not know of the existence of the development order.

From the respective affidavits, various assertions of facts emerge in relation to meetings which the intervener alleges took place, where the applicant's officials were informed of the proposed development, both before and after the issue of development order. There are corresponding denials by the applicant.

By reason of the conflict of affidavit evidence, both parties have vide encls 41 and 50 respectively applied to cross-examine each other's deponents. The applicants submit that the question of fact here cannot be determined without the benefit of cross-examination. The intervener says that cross-examination might not be necessary if the court takes the approach suggested by the Supreme Court in *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400 with regards to contested facts on

affidavits, and Lord Templeman's advice in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433 on determining whether facts alleged are credibly denied. A

In my judgment, the authorities have established that our courts in such a situation have adopted the approach of making a critical assessment on affidavits in lieu of ordering cross-examination of deponents (see *Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd* [1994] 2 MLJ 789; *Bank Negara Malaysia v Mohd Ismail & Ors*, supra, *Tay Bok Choon v Tahansan Sdn Bhd*, supra, *Suppuletchimi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368). This application in encl 30, in my view, can be decided without any reference to cross-examination. B

The knowledge of the applicant regarding the development order may be derived from: C

(a) newsletters and other literature in the hotel trade in 1992 itself of the fact of Fairmont Hotel being built; and

(b) pre and post-development order meetings with applicant's senior officials where the fact of building the hotel was disclosed. D

As regards (a), the applicant does not deny the existence of this literature being circulated in 1992 amongst those in the hotel trade. The applicant is in the hotel trade since it operates the Park Royal Hotel adjoining the site of the proposed Fairmont Hotel. It is significant that the applicant does not deny the receipt or knowledge of these publications. It strains credulity that the applicant did not know of a 17-storey hotel being built next to their own hotel. E

The obvious and most plausible explanation is that until the *Datin Azizah* decision in August 1992, the applicant saw no prospects in law of successfully blocking the adjacent development and were therefore indifferent to it. F

As regards (b), there is also no credible denial of the meetings or of the fact of them being told of the hotel development. It is necessary to refer to the following facts: G

(a) The applicants owns Lot 817 which is a vacant parcel of land contiguous to the interveners' said land.

(b) Sometime in July 1991, whilst as part of a Malaysian delegation on a visit to South American countries, the chairman of the Low Yat Group Companies, Tan Sri Low Yow Chuan, discussed with Encik Razali Abdul Rahman, the then chairman of President Hotel Sdn Bhd, about the possibility of Lot 817 being sold to the intervener. During the said discussion, the said Encik Mohd Razali Abdul Rahman was informed about the pending application to Datuk Bandar Kuala Lumpur for a development order and when asked if his company (President Hotel Sdn Bhd) would object to the proposed development, he said, 'Go ahead, I will not stop it'. H I

(c) On 22 October 1991, the Datuk Bandar Kuala Lumpur issued a development order in favour of the intervener.

(d) Sometime after the development order was issued, a meeting was convened at a restaurant in Kuala Lumpur which was attended by Tan Sri Low Yow Chuan, Jeffrey TL Ng (managing director of the intervener), Lau Gee Teong (director of Low Yat & Sons Realty Sdn Bhd) and Encik Mohd Razali Abdul Rahman (chairman of President Hotel Sdn Bhd). The discussion pertained to, inter alia, the purchase of Lot 817 by the intervener company for use as a car park in conjunction with their proposed hotel. At the said meeting, Encik Mohd Razali Abdul Rahman was informed that the development order in favour of the intervener had been approved by Datuk Bandar Kuala Lumpur. Encik Mohd Razali has asserted that the lunch meeting was held in August 1992. Even accepting that the meeting was in August 1992, this does not explain why the applicant did not file the application within six weeks of becoming aware that the development order had been issued.

(e) Encik Mohd Razali Abdul Rahman filed an affidavit on 12 April 1994 (encl 34). As regards the conversation between himself and Tan Sri Low Yow Chuan during the South American tour, he says in para 3(c) of that affidavit that 'to the best of my recollection, no such discussion took place'. In that affidavit, Encik Mohd Razali also purports to be unable to recollect if the development order was discussed at the lunch meeting in August 1992. This hardly qualifies as a credible denial.

(f) On 17 June 1992, the intervener's senior executive manager, Mr Chia Sin Keong attended a meeting on the 3rd Floor of President House at Jalan Sultan Ismail, Kuala Lumpur, to discuss the proposed construction of shopping bridges between Sungei Wang Plaza and the proposed construction of Low Yat City Plaza. Mr Michael Yam Kong Choy, property manager of President Hotel Sdn Bhd, was present at that meeting. After the meeting had concluded, the said Michael Yam Kong Choy asked Chia Sin Keong whether the intervener had obtained the development order for the construction of the budget hotel and was told that the development order had been obtained. This development order was again brought to the attention of Michael Yam Kong Choy during another meeting soon after the earlier meeting on 17 June 1992.

(g) Michael Yam Kong Choy filed an affidavit affirmed on 1 April 1994 (encl 35), wherein he gives a reply, similar to that of Mohd Razali and says, in para 3(d) of that affidavit, that he 'cannot recollect being informed about the development order'. That is a convenient stand. However, if he cannot recollect, then it would be inherently inconsistent for him to state that he was not informed about the development order.

Having regard to all the affidavits, I found that the important issue such as the development order cannot escape the market-sensitive minds of

the applicant's executives. It seems clear to me that at least by August 1992, the chief executive of President Hotel Sdn Bhd, Encik Mohd Razali Abdul Rahman, was aware that the intervener had obtained a development order from the Datuk Bandar Kuala Lumpur to develop the subject land and construct the 17-storey hotel. Further, as early as June 1992, the property manager of President Hotel Sdn Bhd, Michael Yam Kong Choy, was aware of the development order having been issued in favour of the intervener. In the circumstances, the assertion by Saleha Ramly in her affidavit of 16 July 1993 (encl 1) that it was only in March 1993 that they suspected that the intervener's land was going to be developed, cannot be accurate or true. The statement in her affidavit vide para 9 thereof, that it was only when the respondent wrote to their solicitors by letter dated 4 June 1993 that they became aware of the existence of the development order, is also untenable.

It is obvious that the applicant company had decided to challenge the development order only after learning of the Supreme Court decision in *Datin Azizah*'s case. That is the real reason for the delay.

By reason of the foregoing, I allow the intervener's application in encl 30 and accordingly make an order in terms of the motion herein.

Application allowed.

Reported by PY Lo